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Supreme Court of the United States

OCTOBER TERM, 1899.

Filed April 26, 1900.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

No. 273. VERSUS

LUCY DIXON, Administratrix of Alexander Dixon, deceased; R. H. CHALKEY and WILLIAM SIDLES,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Plaintiff in Error.

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STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This action was brought October 19, 1894, by the defendant in error, Lucy Dixon, administratrix of Alexander Dixon, deceased, against the plaintiff in error, the Chesapeake & Ohio Railway Company, and the defendants in error, R. H. Chalkey and William Sidles, in the Circuit Court for Boyd County, state of Kentucky, to recover damages for the death of said Alexander Dixon, caused by his being run into by a train on said company's railroad track whilst he was attempting to cross it at a highway crossing

in said county and state, the engine of which train was in charge of the defendants in error, R. H. Chalkey and William Sidles, as engineer and fireman, respectively.

The petition alleged (page 2 of the transcript) that the death of said Alexander Dixon in this manner was caused "by the negligence of the defendants, the Chesapeake & Ohio Railway Company, and of its agents and servants, R. H. Chalkey and William Sidles;" that said R. H. Chalkey and William Sidles "were—and a long time theretofore had been—servants of the corporate defendant in charge and control of said train and then and there were—and a long time theretofore had continuously been—respectively engineer and fireman of said train;" that "said negligence of the corporate defendant was done by and through its said servants and other of its servants then and there in its employment;" and that "said negligence was the joint negligence of all the defendants."

Before answer filed and in due time, to-wit, at the January Term, January 30, 1895, of said Boyd Circuit Court, said corporate defendant, plaintiff in error herein, filed (page 3) in said Circuit Court its petition for the removal of the cause to the United States Circuit Court for the District of Kentucky, accompanied by an appropriate bond, which was approved by the Court.

This petition for removal alleged (page 4) that there was "in said suit a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit, a controversy between your said petitioner, the Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is a corporation created, organized and existing under and by virtue of the laws of the state of Virginia and a citizen of the said state of Virginia and the said plaintiff, Lucy Dixon, administratrix of Alexander Dixon, who, as your petitioner avers, was then and still is a citizen of the

state of Kentucky;" "that the said controversy is of the following nature, viz., whether your petitioner is liable to the said plaintiff for damages on account of the death of the said intestate, alleged to have been caused by the negligence of certain of its servants therein named and made defendants thereto and other of its servants then and there in its employment and who are not named, it being claimed that because thereof your petitioner is liable in damages to her, and that your petitioner and the said plaintiff are both actually interested in said controversy;" and "that the defendants, R. H. Chalkey and William Sidles, are neither necessary nor proper parties defendant to this cause, and that they were made parties defendant to this cause for the sole and single purpose to prevent a removal by petitioner of this cause to the Circuit Court of the United States for the District of Kentucky and thereby unlawfully to deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States."

At the time the petition for removal and bond were filed the corporate defendant, plaintiff in error herein, moved the Court (page 3) to transfer and remove the cause to the United States Circuit Court for the District of Kentucky; and, at another day in said term, said Boyd Circuit Court overruled the petition and motion for a removal of the cause, to which ruling said defendant excepted. (Page 6).

Thereafter the action proceeded in said state Court; the pleadings were completed; a trial was had at its September Term, 1895; this resulted in a verdict in favor of the plaintiff for $10,000; and a judgment was entered thereon against all the defendants. (Page 11). On September 1, 1896, an appeal was taken by all the defendants to the Court of Appeals of the state of Kentucky (page 14) from this judgment, and it was affirmed by that Court October 28, 1898. (Page 17).

Amongst other errors relied on by the corporate appellant

for reversal was the action of the lower Court in overruling its petition and motion for a removal of the cause to the United States Circuit Court for the District of Kentucky and proceeding further therein, and as to this error said Court of Appeals (page 19) had this to say:

"The ground upon which the transfer was sought, as alleged in the petition asking it, is that the action is wholly between citizens of different states, the Chesapeake & Ohio Railway Company being a corporation created under the laws of the state of Virginia and a citizen thereof, while appellee, Lucy Dixon, is and was a citizen of the state of Kentucky. As appellants, Chalkey and Sidles, were, when this action was commenced, citizens of Kentucky, the Boyd Circuit Court had jurisdiction of the persons of all the defendants, as well as of the subject of the action, if the defendants were jointly guilty of the negligence alleged to have been the cause of the death of Alexander Dixon, and jointly liable therefor.

"It is alleged by appellee in her petition, and so far from the contrary being shown by the appellant, the Chesapeake & Ohio R. R. Co., is clearly proved by the evidence in this case, that appellants, Chalkey and Sidles, as engineer and fireman of said train, were guilty of the negligence causing said death, and that the Chesapeake & Ohio R. R. Co., through its said employes, was also guilty of said negligence, and therefore they were jointly liable for the destruction of the life of said Dixon caused thereby.

"It is not material that, as alleged in the petition for a transfer of this case, Chalkey and Sidles were made parties defendant for the single purpose of preventing the removal of the case by the Chesapeake & Ohio R. R. Co. to the Circuit Court of the United States for the District of Kentucky, or what may have been the motive of the plaintiff for bringing a joint action, unless they were wrongfully and illegally joined, and such is the doctrine as settled by the Supreme Court of the United States.

"As, therefore, appellant, Chesapeake & Ohio R. R. Co., neither sufficiently alleged nor attempted to prove that the defendants were wrongfully joined as such, the lower Court properly refused to make the transfer."

Thereafter said corporate appellant filed a petition for re-

hearing before said Court of Appeals, and as to said error, had this to say thereon (page 25) :

"We would direct the Court's attention again to the error of the lower Court in refusing to remove the case to the Federal court, a proper petition and bond for removal having been filed in due time, The court gives as its reason for so holding that the appellant and its servants, united with it as defendants, are jointly liable. We submit that this court is in error in so holding. It seems to us that it is impossible to escape the reasoning of the cases cited in our brief on this point, to-wit :

"*Warax* v. *C., N. O. & T. P. Ry. Co.*, 72 Fed., 637.
"*Hukill* v. *M. & B. S. R. R. Co.*, 72 Fed., 745.

"It is easy to say that the appellant and its servants are jointly liable, but not so easy to refute the reasoning of those cases.

"In addition to those cases, see the case of

"*Hartshorn* v. *R. R. & Co.*, 77 Fed., 9,

to the same effect, as above.

"It may be that the case of *Deere, Wells & Co.* v. *Chicago, etc., Co.*, 85 Fed., 876, has been or will be cited as an authority to the contrary ; but it is not. It expressly recognizes the above cases as correct. That was not a case where the master was sought to be made liable on the principle of respondent superior, but for his own negligence, which it was claimed cooperated with the servant's negligence, and the master and servant were therefore sued jointly upon the same cause of action ; not as here, where the master is sought to be made liable for the servant's negligence because of the relation between them, which is one cause of action, and the servant is sought to be made liable for his own negligence, which is another cause of action. Here there was no joint liability, nor could any be claimed.

"The causes we rely on have been recently adhered to by Judge Barr, of this Federal district, and that since the decision in 85 Federal, 876 ; that case was cited to him, but he did not consider it as changing, or attempting to change, the decisions of his Federal circuit.

"In the case of *Henry Lambert's administrator* v. *C. & O. Ry. Co.*, pending at Covington, Ky., at last May Term of Federal court, he rendered the following opinion, to-wit :

"'This suit seeks to recover of the defendant, the C. &

O. Ry. Co., and William Myers and two other employes of the C. & O. Ry. Co. for negligence which is alleged to have caused the death of plaintiff's intestate.

" 'William Myers, Walton Elliot and Charles Long were at the time of the alleged negligence employes of the C. & O. Ry. Co. as conductor, engineer and fireman, respectively, of the train that ran over and killed the decedent, Enyart, and they are charged with the negligence which caused his death. The defendant railway company is sought to be made liable for these employes negligence, and is alleged to be jointly liable in this action with these employes.

" 'The employes are alleged to be of the same citizenship with the plaintiff, but they are not before the Court by actual service of summons in the state Court.

" 'In this condition of the record the C. & O. Ry. Co. filed a petition for removal to this Court, alleging diverse citizenship between plaintiff and itself, and alleging that the defendants, who were employes, were not necessary or proper parties, and were only made defendants to prevent a removal to this Court, and alleging that they and the defendant railway company were jointly liable for the alleged negligence.

" 'The state Court allowed the removal of the defendant, the C. & O. Ry. Co., and approved the bond executed by said company.

" 'The plaintiff has filed answer in this Court denying that the defendants, Myers, Elliott and Long were made parties defendant in bad faith or with the purpose of preventing a removal to this Court, and moved the Court to remand the cause to the Boyd Circuit Court, from whence the case has been removed.

" 'The motion has been submitted and the defendant railway company has offered no evidence to sustain its allegations of bad faith upon the part of plaintiff in uniting Myers and Elliott and Long as defendants with their employer, the railway company.

" 'Thus the question to be decided is whether these defendants are jointly liable with their employer, the railway company. Here the railway company is sued for the negligence of their servants in and about the business of the railway company, and it is now settled in this circuit that the employes (servants) are not jointly liable with their employer (master), though the negligence was that of the servants; but there must be an election to sue as between the master and his servant unless the master participated

in or directed the act or omission to act which constitutes the negligence.

" 'See *Warax* v. *C., N. O. & T. P. Ry. Co.*, 72 Fed., 638.

" 'The question has not been passed upon by the Supreme Court, but the decision of the Circuit Judges was made after full argument and a careful consideration and is clearly binding upon this court; but if not, should be followed.

" 'The question of what would be the condition of the record had Myers and the other employes been made parties by actual service of the summons in the state court can not arise in this case, as we have seen they are neither before this court nor the state court.

" 'The motion to remand to the state court must be overruled, and it is so ordered.' "

On the 23d day of March, 1899, the petition for rehearing was overruled (page 29) and the judgment of the Court of Appeals of Kentucky became final.

On the same day the corporate appellant gave notice to the individual appellants that on the succeeding day it would apply to the Hon. James H. Hazelrigg, Chief Justice of the Court of Appeals for Kentucky, for a writ of error, with supersedeas, to the Supreme Court of the United States, and in case they did not appear and join in said application it would ask for a writ of error in its own name. Said individual appellants accepted said notice and declined in writing to join in said application for a writ of error. (Page 30).

Thereafter, pursuant to said notice, application was made for said writ of error before Chief Justice Hazelrigg and it was allowed by him. (Page 31). Supersedeas bond was executed, and it and an assignment of errors were duly filed. (Pages 32 and 33).

SPECIFICATION OF ERRORS.

The errors so assigned are as follows, to-wit:

"1. The court erred in affirming the judgment of the Boyd Circuit Court, whereas it should have reversed the same, with directions not to proceed in the said cause.

"2. The Court erred in holding in substance and effect that the Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to remove the cause pending in the Boyd Circuit Court against it to the Circuit Court of the United States for the District of Kentucky, and that the said Chesapeake & Ohio Railway Company had no right under the Constitution and laws of the United States to have the said cause removed as aforesaid.

"3. The Court erred in holding that the Boyd Circuit Court had any right to proceed any further in the said cause after the petition to remove the same on behalf of the Chesapeake & Ohio Railway Company had been filed in the said Boyd Circuit Court.

"4. The Court erred in holding that the proceedings in the Boyd Circuit Court after the filing of the petition of the Chesapeake & Ohio Railway Company therein for the removal of the said cause to the Circuit Court of the United States were not void and of no force and effect as against the Chesapeake & Ohio Railway Company."

And they are each and all relied upon herein.

The question which they all raise is as to whether plaintiff in error was entitled to a removal of the cause from the state to the Federal court, and that is the sole question for consideration and determination by this Court.

BRIEF OF THE ARGUMENT.

Is there a separate controversy in this case between plaintiff in error, corporate defendant in the trial court, and the defendant in error, Lucy Dixon, administratrix of Alexander Dixon, deceased, plaintiff therein, "which can be fully determined as between them?"

The principal ground upon which the right to a removal

of this cause from the state to the Federal court is based, is that it comes within the third clause of the second section of the Act of August 13th, 1888, which is the same as the third clause of the second section of the Act of March 3d, 1887. Said clause is as follows, viz.:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove the said suit into the Circuit Court of the United States for the proper district."

This clause presupposes that there may be in a given lawsuit two or more separate controversies, and provides that where such is the case, and one of them is wholly between citizens of different states and can be fully determined as between them, one or more of the defendants actually interested in such controversy may have it removed.

In the case of

Western Union Telegraph Co. v. *Brown*, 32 Fed., 337,

Brewer, J., after pointing out that the first two clauses of said section of said Act of 1887, which are the same as the first two clauses of the Act of 1888, applied to "cases in which there is but a single controversy," the first clause applying, "if the case is one in which there is a Federal question;" and the second one, "if the removal is sought on the ground of ownership alone;" as to the third clause had this to say, viz.:

"The third clause of the second section of the Act of March 3, 1875, governs that class ef cases only where there are two or more controversies involved in the same suit, one of which controversies is wholly between citizens of different states."

It will be conceded that this is a suit of the character mentioned in said section, and that the plaintiff in error, corporate defendant in the trial court, and the defendant in error, plaintiff therein, Lucy Dixon, administratrix of Alexander Dixon, deceased, are citizens of different states. The sole question involved, therefore, in determining whether this cause comes within said third clause of said section, and is removable, is whether the controversy between those parties is separate from the controversy between said defendant in error and the defendants in error, Chalkey and Sidles, the individual defendants in the trial court. If such is the case, then there is a controversy in this cause which is wholly between citizens of different states and which can be fully determined as between them, and plaintiff in error is entitled to a removal. If such is not the case such a controversy does not exist in the cause and it is not removable. The solution of this question as to the existence of separable controversies in any given lawsuit depends entirely upon the allegations of the declaration, complaint or petition filed by the plaintiff, which must be accepted as true. Before the Act of March 3, 1887, became the law when a petition for removal was required to be filed "before or at the term at which said cause could be first tried and before the trial thereof," and under which, therefore, a petition for removal might be filed after all the pleadings in a cause were in, and the issues in the case were made up, it was well settled that the question as to whether there were separable controversies involved in a given suit was to be determined alone from the allegations of the plaintiff's initial pleading.

In the case of

L. & N. R. R. Co. v. *Ide*, 114 U. S., 52,

Mr. Chief Justice Waite said:

"The cause of action is the subject matter of the contro-

versy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

In the case of

Hax v. *Caspar*, 31 Fed., 499,

Brewer, J., said:

"The removal does not depend upon the question of what issue remains to be tried, but is to be determined by the nature of the cause of action presented in the complaint."

It followed from this that separate defenses made to a single controversy presented by plaintiff's initial pleading, where there was more than one defendant, did not create separate controversies. Notwithstanding such separate defenses the controversy remained single as it was before they were plead. This was so held in numerous cases.

Hyde v. *Ruble*, 104 U. S., 407.
Winchester v. *Land*, 108 U. S., 130.
Ayers v. *Wiswell*, 112 U. S., 187.
L. & N. R. R. Co. v. *Ide*, 114 U. S., 52.
St. L., etc., Ry. Co. v. *Wilson*, 114 U. S., 60.
Fidelity Insurance Co. v. *Huntington*, 117 U. S., 280.

On the other hand, where but one defendant plead to the cause of action, the cause of action was not cut down to a controversy solely between him and the plaintiff. It remained a controversy between plaintiff and all the defendants as presented in plaintiff's initial pleading.

Putnam v. *Ingraham*, 114 U. S., 57.

Likewise, though all the defendants but one disclaimed having a controversy with plaintiff, it was still a controversy between plaintiff and all the defendants.

Hax v. *Caspar*, 31 Fed., 499.

Since the act of March 3, 1887, by which the petition for

removal is required to be filed "at time or any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff," the question as to the controversies involved and the removability of the cause is still to be determined by the averments of the declaration or complaint. It could not well be otherwise, when the question is necessarily up before any other pleadings are filed.

In determining from plaintiff's initial pleading the question as to separate controversies in a suit against several defendants, the matter to be settled is whether a joint cause of action against all the defendants is declared on or whether separate causes of action against each defendant form the basis of the action. If a joint cause of action against all the defendants is sued upon the suit contains but a single controvery and can not be removed under the the third clause. If separate causes of action against each defendant are sued upon then the suit contains separable controversies, and if the other requirements of the statute are met the cause is removable.

In the case of

Beuttel v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed., 50,

Shiras, J., said:

"The right of removal turns upon the question whether the plaintiff, by the averments of fact in his petition, shows that he based his action upon a cause of action which is joint or which may be made so, at the option of plaintiff against all the defendants and that plaintiff has in the latter case elected to declare against all the defendants jointly."

And it is to be noted that the question as to whether the cause of action declared on is a joint one or not is to be determined not by any claim put forth in plaintiff's initial pleading, but, as stated by Shiras, J., in above ex-

tract, "by the averments of fact in his petition." If according to the facts alleged a single controversy or separable controversies are involved in the suit, it must be so accepted whatever may be the claim of the plaintiff with reference thereto.

If two or more separable controversies appear from the averments of plaintiff's initial pleading to be involved in the suit, it is entirely immaterial whether they are properly or improperly joined, *i. e.*, whether there has been a misjoinder or not of the two or more controversies involved in it. It is simply sufficient that a plurality of separate controversies so appear to be involved in the same suit, and the one sought to be removed comes within the other requirements of the removal statute, irrespective of any question as to the propriety of their union therein.

In the case of

Barney v. *Laytham*, 103 U. S., 205,

it was held that the misjoinder of the two separate controversies involved in that suit, which misjoinder was assumed for the sake of the argument, did not prevent a removal from the state to the Federal court of that controversy therein which came within the terms of the removal statute and that not only this, but that the removal of that controversy carried with it the other controversy, though it may have been improperly joined with it. Mr. Justice Harlan said:

"No objection was taken by the defendants in the Court below to the complaint upon the ground of multifariousness or misjoinder and the plaintiffs should not be heard to make it for the purpose or with the effect of defeating the right of removal. They are not in a position to say that that right does not exist because they have made defendants those who were not proper parties to the entire relief asked. The fault, if any, in pleading, was theirs. Under their mode of pleading whether adopted with or without a purpose to affect the right of removal, accorded by the

statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different states, and can be fully determined without the presence of the other party defendant. The right of removal, if claimed, in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed. The state Court ought not to disregard the petition upon the ground that in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been separated in separate suits. Those are matters more properly for the determination of the trial Court; that is, the Federal court, after the cause is docketed there."

Whilst then the fact that there has been a misjoinder of two or more separate controversies in the same suit will not prevent a removal of the entire suit, it should be borne in mind on the other hand that it is not essential that there should be a misjoinder in order to allow a removal. There may be a removal where separate causes of action are properly joined. If it is a separate controversy and comes within the statute in all other particulars it should be removed, and the other separate controversies with it, though they have been properly joined. Indeed it would seem that, though the language of the third clause of second section of said acts is broad enough to cover cases where there has been an improper joinder of two or more separate controversies, it was intended principally and primarily to reach a case where the joinder is proper. For where the joinder is improper said third clause is unnecessary in order that there should be a removal of that controversy which comes within all the requirements of the statute. In such a case the defendant thereto can move for an election between the several controversies and if that controversy is elected he can then have it removed under the second clause of that section of those acts. This, however, is based upon the idea that the state Court will decide the question of misjoinder correctly and to guard against an erroneous de-

cision on this point the third clause is necessary even in a case of misjoinder. That there may be a removal where separate causes of action against several defendants are properly joined in one suit is well put by Shiras, J., in the case of

Beuttel v. *Chicago, M. & St. P. Ry. Co., supra.*

He there said:

"The mere fact that the plaintiff may have the right to make several parties defendant in the same action does not settle the question whether the petition presents separable controversies. Thus, under the code system of pleading, it is permissible to unite in one action as defendants, the maker, indorser and guarantor of a promissory note, yet it would hardly be claimed that the action against them was a joint action in the sense in which that term is used in the cases just cited. The liability of the guarantor or indorser is based upon a different obligation or contract from that of the maker of the note, and although both may be made defendants in the same action, yet they are defendants to different causes of action, in the proper legal sense of that term. The cause of action is a breach of contract or a tort committed by the defendant. This is not to be confounded with the injury resulting therefrom, nor with the remedy provided by law for the benefit of the party injured in person or property. In a suit against the maker of the note, the cause of action is the breach of the contract to pay the amount of the note at maturity. This is a contract absolute and unconditional. The injury to plaintiff is the result of the breach of the contract on part of the maker of the note, and is made good by awarding damages to plaintiff, and the remedy is the judgment and the execution for the collection thereof. In a suit against the indorser or guarantor of the note the cause of action is the breach of the contract of the indorser or guarantor, which is not a contract absolute to pay the note. It is a conditional contract wholly separate and distinct from that of the maker. A breach of the contract by the maker does not create a breach on part of the indorser or guarantor."

The question, therefore, is not whether the several defendants to the action are properly sued jointly in the same

action, but whether they have been sued, according to the facts alleged in plaintiff's initial pleading, upon a joint cause of action or upon separate causes of action against each which are properly joined in the same suit. The third clause of the second section of said acts was not made to fit alone a case of several separable controversies improperly joined in the same suit.

This distinction seems to have been lost sight of in the case of

Moore v. *Los Angeles I. & S. Co.*, 89 Fed. 73.

That was a suit by an employe against his employer and an insurance company which insured the latter against liability for injuries to employes jointly by virtue of Section 2777 of California civil code, which provides that one who indemnifies another "against an act to be done by the latter is liable jointly with the person indemnified and separately to every person injured by such an act."

It was held that the cause was not removable though it otherwise came within the requirements of the removal statute.

Welborn, J., said:

"The liability of the iron and steel company and the assurance corporation being joint as well as several and the plaintiff having elected to proceed against them jointly the suit so far as concerns plaintiff and said companies involves a single controversy."

But we submit that though the two defendants were properly sued jointly it was upon separate causes of action and not upon a joint cause of action, against them.

The vital question then in cases claimed to come within the third clause of the second section of said acts is whether the several defendants sued jointly, that is, together in the same suit, are sued on a joint cause of action or upon separate causes of action. If they are sued upon a joint cause

of action it makes no difference that separate causes of action existed in favor of the plaintiff against the several defendants upon which separate suits might have been brought. Nor does it make any difference that in a suit on the joint cause of action a separate recovery may be had in the same suit against either of the defendants upon the separate cause of action. This has been so held by this Court in actions of contract in jurisdictions where it is provided by statute that such actions may be joint or several and if joint several recovery may be had and in actions of tort where such is the rule by the common law.

A case in which it has been so held as to actions of contract is that of

L. & N. R. R. Co. v. *Ide*, 114 U. S., 52.

Cases in which it has been so held as to actions of tort are as follows, viz:

Pirie v. *Tvedt*, 115 U. S., 41.
Sloane v. *Anderson*, 117 U. S., 275.
Plymouth Min. Co. v. *Amador C. Co.*, 118 U. S., 264.
Little v. *Giles*, 118 U. S., 596.
Thorn Wire Hedge Co. v. *Fuller*, 122 U. S., 535.
L. & N. R. R. Co. v. *Wangelin*, 132 U. S., 599.

Some Federal Judges, however, at first held that such suits where a separate recovery might be had were removable. In the case of

Kerling v. *Colthauser*, 16 Fed., 705,

Drummond, J., so held; Harlan and Blodgett, J. J., concurring in the opinion. And in the case of

Pirie v. *Tvedt*, 115 U. S., 41,

where the now accepted doctrine was laid down, Mr. Justice Harlan dissented; Mr. Justice Woods concurring in the dissent. Mr. Justice Harlan there said:

"Where the plaintiff in a suit against several defendants in tort, is not required to prove a joint cause of action against all of them, but may have judgment as to those against whom he makes a case, there is a controversy in the suit which is wholly between plaintiff and each defendant and finally determinable as between them without the presence of the other defendants as parties in the cause."

We are now prepared to take up the consideration of the question as to whether or not this action is a case involving a plurality of controversies, which controversies are separable, and if so, whether the controversy between plaintiff in error and the defendant in error, Lucy Dixon, administratrix of Alexander Dixon, deceased, is one of them and can be fully determined between them. What we have had to say thus far in our argument, though not bearing directly on this question, finds justification, at least, in being useful as a proper approach to a consideration of that question and, in a word, as clearing the deck for action.

This question, as we have seen, is to be determined by ascertaining whether plaintiff's petition states a joint cause of action against the corporate and individual defendants. If it does, then this suit involves a single controversy and is not removable; the action of the lower courts was correct and should be affirmed. If, however, that petition does not state such a cause of action, but states a separate cause of action against the corporate defendant and a like one against the individual defendants, then the suit involves two separable controversies, whether properly joined or not, each of which can be fully determined as between the parties thereto, and is removable; and the action of the lower courts was erroneous and should be reversed. This is to be determined by the averments of fact contained in the petition. That pleading first alleged that the decedent's death was caused by the negligence of all the defendants. This inclusive averment is qualified by the next allegation that the negligence of the corporate defendant was done "by

and through " the negligence of the individual defendants and other of its servants. The facts alleged in the petition, therefore, are that the individual defendants were the servants of the corporate defendant and that the decedent's death was caused by the negligence of said individual defendants and other of its servants. It is not charged or averred that the corporate defendant was itself guilty of any negligence, except so far as the negligence of its said servants may be considered its negligence. It is true that it is charged that the negligence of said servants was the negligence of the corporate defendant and that it was the "joint negligence of all the defendants." But, as well said by Taft, Circuit Judge, in the case of

Warax v. *Cincinnati, N. O. & T. P. Ry. Co.*, 72 Fed., 637:

"The petition must be construed to mean that the acts of negligence which were complained of in the movement of the engine were acts of the defendant, because committed by and through its agent and servant, the engineer, and that the conclusion that the acts were the result of the joint negligence of the defendant railroad company and the engineer is a mere conclusion of law, based on the proposition that where the engineer, through his negligence, does an injury in the scope of his employment, he and his principal are jointly liable in one action therefor."

There is no averment that the corporate defendant was present by any corporate or superintending officer, and through them the corporate defendant committed any negligence. As Judge Taft further said in his opinion in said case:

"If plaintiff intended to charge that the defendant was present by any corporate or superintending officer, so as to constitute what would be a personal interference in the acts complained of by the master, he should have made his petition specific on this point. In his failure to do so, he must rest alone on the proposition of law above stated to justify his joinder of the company and engineer."

Do, then, the averments of fact contained in the plaintiff's petition set forth a joint cause of action in favor of plaintiff against the corporate and individual defendants?

We submit that they do not. In order to create a joint cause of action in favor of one against two or more, that which is the basis of liability must itself have been joint. As, for instance, in order that a cause of action in contract may be joint, the promise which forms the basis of liability must have been the joint promise of those claimed to be jointly liable. Likewise in tort, in order that a cause of action therein may be joint, the tortious act complained of must have been the joint act of those claimed to be jointly liable, or the harmful result must have been produced by the union or concurrence of their separate tortious acts. In tort, therefore, there are two classes of cases where it is recognized that a joint cause of action may exist against two or more for a tort. One class is where the act which produces the harmful result grows out of the concerted action of several persons. In such case that act is the joint act of all those persons. This is the usual instance of a joint tort affording a joint cause of action.

The other class is where the harm results from the concurrent action of two or more. An instance of this class may be found in the case of

Brown v. *Coxe Bros. & Co.*, 75 Fed., 689.

There plaintiff alleged that while employed on a steamboat he was injured by the falling of a coal bucket operated by one C, and that C was negligent in using defective machinery, and in operating it negligently, and that the steamboat owner was negligent in not providing him a safe place for work, and in not warning him of the danger. It was held that as the alleged acts of negligence of C and the steamboat owner, though distinct in themselves, concurred

in producing the injury, their liability was joint as well as several.

Seaman, District Judge, said:

"But the rule under which parties become jointly liable as tort feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes liable because of his negiect of duty and they are jointly liable for the single injury inflicted because the acts of omission of both have contributed to it."

Another instance may be found in the recent Kentucky case of

Pugh v. *Chesapeake & Ohio Ry. Co.*, 101 Ky., 77.

There Paynter, J., refers to both cases of joint liability in the following language, viz:

"Parties may form a conspiracy to injure one. Each of the conspirators may be guilty of distinct acts, all of which concur in producing the injury. An action may be maintained against all of them to recover the damages resulting to the injured party. So if an injury is produced, not by design, but by the concurrent acts of negligence of two or more persons, although their acts were distinct and separate, still they incur a joint and separate liability for the injury which they produced."

The reason why in this class of cases the parties committing the concurrent acts are held jointly liable is thus stated by Taft, Circuit Judge, in the Warax case referred to above:

"The rule which permitted a plaintiff injured by the joint act of defendants to join them in one action was rested originally on the theory that they were to be held as conspirators, and that each having knowingly embarked on the unlawful venture, was liable for all that the other did and that therefore they could be held as partners in wrong. Joint trespassers were held on the same principle, and finally where two persons were guilty at the same time of

mere acts of negligence operating together to cause injury to a third person, it was held that they must be regarded as acting in concert, and that each must be held liable for the entire damage, as for a joint tort."

It will be found, therefore, upon investigation that all the accepted and unquestioned cases of joint liability in tort come within one or the other of these two classes of cases, *i. e.*, where the harmful result complained of is produced by the concerted or concurrent action of those claimed to be jointly liable. In the very nature of things there can be no joint liability in tort in any other way. To be jointly liable for an injury there must be union in some way in producing the injury.

How, then, is it in a case where the injury has been caused by the negligence of a servant, the master himself not having been negligent and in no way participating in the servant's negligence, except so far as it may truthfully be said that a master participates in the negligence of his servant where the latter is guilty of negligence in the course and within the scope of his employment, which we maintain can not be so said; or, in other words, where the liability of the master grows out of the fact of the relationship existing between him and the servant and nothing else, as is the case here?

It is undoubtedly true that in such case the master, as well as the servant, is liable to the party injured. But has he a joint cause of action against them, so that, by reason thereof, he can sue them jointly? In cases where a master personally participates in, directs, authorizes or consents to the commission of a tort by his servant there is no trouble in accounting for his liability to the party injured for such tort. In speaking of the liability of the master for injuries occasioned under such circumstances,

1 Jaggard on Torts, page 245,

says:

"Such results are the direct outgrowth of the deliberate intention of the master, and he is as much to be charged with the responsibility as if he had performed the act in person. As to cases of this kind the maxim, *'qui facit per alium facit per se'* . . . furnishes a sufficient reason."

And, again, on page 272 it says:

"So far as this reason is sufficient, it would seem, on final analysis, to be logically no more than a clear case of the connection of the master as to the juridical cause of the injury."

Mr. O. W. Holmes, Jr., now Mr. Chief Justice Holmes, thus puts it in

4 Harvard Law Review, page 347:

"It is plain good sense to hold people answerable for wrongs which they have intentionally brought to pass and to recognize that it is just as possible to bring wrongs to pass through free human agents as through slaves, animals or natural forces. This is the true scope and meaning of *'qui facit per alium facit per se,'* and the English law has recognized that maxim as far back as it is worth while to follow it."

This general theory of liability he extends to embrace consequences of acts specifically commanded with knowledge of circumstances under which those consequences were the natural result of those acts. He says:

"So it is only applying the general theory of tort to hold a man liable if he commands an act of which the natural consequence, under the circumstances known to him, is harm to his neighbor, although he has forbidden the harm. If a trespass result, it is as much the trespass of the principal as if it were the natural, though unwished for, effect of a train of physical causes. In such cases there is nothing peculiar to master and servant; similar principles have been applied where independent contractors were employed."

Nor is there any difficulty in holding that, in such cases, the party injured has a joint cause of action against the

master and servant, for, as said by Taft, Circuit Judge, in the Warax case, "the master is really a co-actor with the servant." There is in such cases union between the two in producing the injury complained of.

But when we come to a case like the one in hand, where it is not possible to say that the master is a co-actor with the servant, where indeed he is not an actor at all in the doing of the act which has caused the injury, we find an entirely different state of case. Upon what ground is it that in such a case the master is responsible for the injury done by the servant's act of negligence?

In his work on The Common Law, page 6, Mr. O. W. Holmes, Jr., now Mr. Chief Justice Holmes, says:

"A baker's man, while driving his master's cart to deliver hot rolls of a morning, run another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered from the time of Ulpian to that of Austin that he was to blame for employing an improper person. If he answered that he used the greatest possible care in choosing his driver, he is told that that is no excuse, and then perhaps the reason is shifted, and then it is said that there ought to be a remedy against some one who can pay the damages, or that such wrongful acts as by ordinary human laws are likely to happen in the course of the service are imputable to the service."

This "reason offered by the psuedo-philosophy of the Roman jurists" is repeated by Parker, B., in *Sharrod* v. *London & N. W. Ry. Co.*, 4 Exch., 580, 585, where he says that the liability of the master is "in effect for employing a careless servant." But this reason is shown to be unsound by the single fact that no amount of care in selection will exonerate the master, which is held in the case of

Danzey v. *Richardson*, 3 El. & Bl., 144, 161,

and is recognized everywhere.

That such a reason should be propounded for this rule indicates what is a well known fact, that it has been found difficult to justify it on rational grounds.

In the case of

Shea v. *Reems*, 36 La. Ann., 966,

the Court say:

"We never apply the rule respondeat superior without a sense of its hardships on the master."

In the case of

Hayes v. *Miller*, 77 Pa. St., 238,

the Court say:

"To visit a man with heavy damages when he is able to show that he has exercised all possible care and precaution in the selection of his servants is apt to strike the common mind as unjust."

Mr. Pollock, in his Essays on Jurisprudence and Ethics, in speaking of the rule under consideration, which he characterizes as a rule "which imposes liability on men beyond their own acts or defaults" (page 116), says:

"It may be said further, that the rule of vicarious liability is not easy to justify on any rational grounds; that its actual origin is obscure, but probably belongs to a state of society and habits of mind quite different from our own; and that in the maritime law, where its hardship is unusually conspicuous, it has been found needful to mitigate it by express legislation."

And again, on same page, he says:

"History apart, the broad rule of justice would seem at first sight to be that a man shall answer only for his own faults and omissions, or at most for that which he could have prevented, not for faults and omissions of others which he neither encouraged nor approved."

But notwithstanding the apparent injustice of this rule, he says this in its behalf, on same page:

"The rule is maintained throughout the civilized world, and it appears on the whole to be allowed as just, notwithstanding its accompanying hardships, by the common sense of reasonable men. We hear of a protest only now and then, as when unusually heavy damages are given against a railway company, or as in the special matter in hand (employer's liability to one servant for injury caused by negligence of another one) by way of reprisal against attempts to extend the liability still further. That which most men feel to be just must at least have some element of justice in it."

He then proceeds to search for that element of justice. In the first place he directs his attention to the common saying "that the master is liable because the servant is his agent; '*Qui facit per alium facit per se*,'" and as to this he says (p. 117):

"But this is a plain begging of the question; it states the effect of the rule, not any reason for it. We can all understand that a man should be liable for what he really does by another's hand—for actions which he has authorized or tacitly allowed. But here the question is, why he should be liable for actions he has in no way authorized, just as if he had authorized them—why he should be deemed to have done by his servant's hand things which he has not commanded, permitted or desired. Oftentimes the act or neglect for which the master is held to answer is wholly against his interest. It may be such as to involve him in heavy loss, apart from the claims of any person injured. It may be, and often is, something which he has expressly forbidden and done all he could to prevent. Thus, in the very commonest case, a tradesman sends out his horse and cart enjoining the driver to go at a moderate pace. The man drives furiously and runs over a foot passenger. His master is liable. Again, a manufacturer has a steam engine at his works. The engineer is instructed not to let the water in the boiler to run too low. He does let it run too low and an explosion follows. Here, too, the employer is liable for any damage that results to neighbors and passers by. If we say to him, 'You did this by the

hand of your servant, therefore, you must pay for it,' he will answer, 'I neither did it or meant it to be done; on the contrary, I charged the man to do nothing of the kind.' This first explanation, then, is no explanation at all. It is merely an artificial statement of the thing to be explained."

He suggests, without giving it his own sanction, as a way of looking at the matter which may be suspected to count for a good deal in the popular view, the following (p. 118):

"A wrong without a remedy is in theory at least, odious to the law; but in many cases the law can not prevent the remedy from being only nominal. It may compel wrongdoers to pay if they can, but it can not make them solvent; and it must now and then happen that an injured person has no better comfort at his hands than a right of action against a man of straw. To the popular mind a remedy not substantial is no remedy at all, and a remedy of this kind is not only unsatisfying (as it must be to every honest mind), but unintelligible. Hence there is a natural endeavor to fix responsibility on some one who can pay. In the case of injury suffered through a servant's negligence the servant, generally speaking, can not pay and the master can; and the feeling that compensation ought to be had somewhere jumps at the master's liability."

Concerning the maxim "respondeat superior," which he terms, "another question begging maxim," he says (p. 119), that it "is accepted without ado as a precept of natural justice. It is assumed that the relation of master and servant implies by some evident and immutable necessity that the master is to be liable for the servant's acts and defaults. The servants and the work being his, the liability must be his also. Such a view is too crude and formless to be a starting point of fruitful discussion."

Having thus brushed aside or refused to sanction these possible explanations on rational grounds of the rule in question he reaches by analogy an explanation, which he puts forward as the true one, in these words (p. 126):

"We seem, then, to have arrived at something like a rational foundation of an employer's liability to the public for the acts of his servants. He is answerable, not for his servants as agents, or because they are his agents, but for the conduct of his undertaking with due caution. And it matters not whether the undertaking be for profit or not; for the face of the thing being done by the master's orders shows that he finds it worth while to have it done. He is using his own means for his own purposes, whatever profit, pleasure or convenience he may have in view. All this applies equally where the employer is a corporation (as in the familiar case of a railway company); and one of the strongest practical recommendations of the rule is that without it a corporation could not be liable at all. For a corporation, being not a real but an artificial person, can be negligent only by its officers and servants, and a rule of duty confined to personal diligence would leave it scot free."

He gives this same explanation in his work on torts (4th Edit.), page 70. He there says:

"I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."

He quotes from Lord Cranworth the following language, in his opinion, in *Barton's Hill Co.* v. *Reed*, 3 McQ., 266, which he says puts the rule "in a not dissimilar form:"

"The master is considered as bound to guaranty third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

This reasoning, as Mr. Pollock points out, is in accordance with what was laid down by Chief Justice Shaw in the case of *Farwell* v. *Boston & Worcester R. R. Corp.*, 4 Met., 49. He there said:

"This rule is obviously founded on the great principle of social duty that every man in the management of his own affairs, whether by himself or by his agents or serv-

ants, shall so conduct them as not to injure another, and if he does not and another thereby sustains damages, he shall answer for it."

It is, however, subject to this criticism which Mr. Pollock makes in his work on torts, viz.:

"This is, indeed, somewhat too widely expressed; for it does not, in terms, limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or master can be liable where there is no default at all. And the true principal is otherwise clearly enounced."

Mr. Frank W. Hackett, in an article entitled, "Why is a master liable for the tort of his servant?" (7 Harv. Law Rev., page 107) makes another attempt at what he terms, "ascertaining by a process of speculative thought why, upon principles of fairness and justice" the master should be held liable for the torts of his servants, "where the conduct of the servant is altogether his own, the master neither being present, nor, as a matter of fact, countenancing in the slighest degree the act of his servant." The rule of liability in such cases he says "may be concisely stated at follows: For all acts done in the execution of the master's business within the scope of the servant's employment and resulting in the infliction of injury, the master is responsible." He points out that in such case "it is not contended that the master causes the servant's action;" that there is no "causal connection" between the master's order to the servant to do a certain thing for his benefit and an injury to another occasioned by his neglect in doing it; that, whilst "it is true that the servant is prosecuting a duty in his master's behalf and that in a sense he represents his master," "the latter has done nothing nor has he sanctioned the doing of anything, to the injury of the third person:" and that "charging him with the fault of the servant, therefore, is a purely arbitrary act of the law." He claims that the discovery of the true reason why liabil-

ity is imposed upon the master in such a case "would appear to be left, not to research into the reports of earlier decisions, but to our insight into human nature and our perception of the springs of human action" and he characterizes the result of his search as a "sentimental process" which when reduced "to its standard of logical value," is perceived "as a judicial reason" to be "worthless," but when viewed "as an impulse or a conviction to determine how men should treat each other" it is found to be "irresistible."

This is his explanation:

"The rule may be attributed to the influence that our feelings of sympathy have over us for a fellow-being in distress. We can not look upon the unfortunate victim of an accident without being sensible, not only of pity for him, but of more or less indignation and resentment against the person whom we take to be the party in fault. A brewery wagon injures a child. The crowd blame the driver. The sight of a name upon the wagon awakens a feeling against the company. In every instance, upon viewing the servant and the work in which he is engaged, the transition is an easy one over to the employer. Though not present to the senses of the beholder, he is readily pictured in imagination, and associated with his servant as deserving of the severest censure.

"Following close upon this thought, if not the parent of it, is a vague feeling that the injury must be fully repaired. He who robs a man of his sound limb and good health ought to pay roundly for it. The damage has come through human agency. Some man, or men, must make it good. In a confused way (our feelings getting the better of our judgment) we reach a conclusion that all that human means can accomplish must be brought to bear to alleviate suffering; to repair an injury that ought never to have been inflicted. The 'master' being more or less connected in our thoughts with the affair, and being, moreover, a man able to respond with his money, we quickly determine that it is only right that he should assume the responsibility of what we easily call his share in the accident. We see no hardship in making him pay the bills, and we leave him to console himself with the reflection how much better off he is than the poor fellow who has been injured."

In a note to his article he makes reference to the "Reports to the House of Commons of the Select Committee on Employer's Liability for Injuries to their Servants" with accompanying testimony of Bramwell, J., Brett, J., Joseph Brown, Q. C. and R. S. Wright, now Mr. Justice Wright, "where these judges 'let themselves out' more than in court," contained in the Parliamentary Blue Books for the years 1876 and 1877, as shedding some light on this question.

But all are not disposed to accept either this rational or sentimental basis of the rule as sufficient to account for its continuation much less for its origin. Against both can be quoted the great name of Mr. Chief Justice Holmes, whose writings covering the subject have already been referred to. In the articles 4 and 5 Harvard Law Review under the general title of "agency" he maintains that agency is not simply "a dramatic situation to which principles of larger scope are applied," but that it has attached to it "legal effects which are peculiar to it" and its peculiarities, which make it a proper title in the law, are to be sought in certain doctrines to be found in "each of the great departments of the law." Those doctrines he states to be as follows:

"In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden. In contract, an undisclosed principle may bind or be bound to another who did not know of his very existence at the time he made the contract. By a few words of ratification a man may make a trespass or a contract his own in which he had no part in fact. The possession of a tangible object may be attributed to him although he never saw it, and may be denied to another who has it under his actual custody or control."

These four doctrines in the several departments of "tort, contract, ratification and possession" he characterizes as a "series of anomalies or departures from general rule" and

he maintaines that they "must be explained by some cause not manifest to common sense." On the contrary, his contention is that "common sense is opposed to the fundamental theory of agency." He says, in 5 Harvard Law Review, page 14:

"I assume that common sense is opposed to making one man pay for another's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility; unless, that is to say, he has induced the immediate wrongdoer to do acts of which the wrong, or at least, wrong was the natural consequence under the circumstances known to the defendant. I assume that common sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend. I assume that common sense is opposed to the denial of possession to a servant and the assertion of it for a depository, when the only difference between them lies in the name by which the custodian is called. And I assume that the opposition of common sense is intensified when the foregoing doctrines are complicated by the additional absurdities introduced by ratification."

Of these various rules opposed to common sense he says that the first one, the liability of the master for the servant's torts, is the "most flagrant," and that the fact that it "nowadays often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations" has "done much to reconcile men's minds" to it.

How, then, does he account for the existence of these various rules, or rather of that one which we have particularly under consideration? Historically and not otherwise. They all have a "common origin." They are the "survival from ancient times of doctrines which, in their earlier form, embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since." The expression of those rights in the early Roman

law was *patria potestas*, and amongst them was the ownership of slaves. Slavery was also a recognized institution in the early Germanic law. In both the early Roman law and the early German law there was an unlimited liability on the part of the owner for the torts of his slaves, which grew out of what had been a privilege of buying him off from a surrender to the vengeance of the offended party. This liability, therefore, came into existence in these ancient times on substantive ground. Likewise the *patria potestas* was substantive ground for the slaves' contracts, and possession being the contracts and possession of the *pater familias*, and because of it the slave had no standing before the law and his personality was merged in that of the head of the family.

These doctrines came into England from both these sources and survived the servile status. Our learned author, in his work on the Common Law, characterizes them as the "vanishing point" of that status "and the decaying remnant of an obsolete institution." And, as to the liability of the owner for the torts of the slave, he says (p. 16):

"The principle introduced on special grounds in a special case when servants were slaves is now the general law of this country and England, and under it men daily have to pay large sums for other people's acts in which they had no part and for which they are in no sense to blame."

In his articles in the Harvard Law Review he recognizes the Anglo-Saxon institution of *frithborh*, or frank pledge, whereby a *quasi* criminal liability was imposed on master for servant as another possible influence upon the Anglo-Saxon laws touching the civil responsibility of masters.

But not only did these doctrines survive that which gave rise to them. As we are told in these same articles "they were generalized into a fiction," which was nothing in the world but a form of words. That fiction is that "within

the scope of the agency, principal and agent are one," and he terms it the "fiction of identity." This fiction or formula was "only derivative." It was "merely a convenient way of expressing rules which were arrived at on other grounds." But having been once adopted, it soon acquired "an independent standing of its own." Instead of remaining only a short way of saying that when from policy the law makes a master responsible for his servant or because of his power gives him the benefit of his slave's possession or contract, it treats him *to that extent* as the tort feasor, possessor or contractee, the formula became "a reason in itself for making the master answerable and for giving him rights. If the 'act of the servant is the act of the master,' or master and servant are 'considered as one person,' then the master should pay for the act if it is wrongful, and have the advantage of it if it is right. And the mere habit of using these phrases, where the master was bound or benefited by his servant's act, made it likely that other cases would be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words had brought about." In this way this fiction rested on the law, and "tended to carry its anomalies still further."

These conclusions our learned author claims to have reached "not merely by conjecture," but upon evidence gathered from "nooks and corners," and these articles set forth that evidence in detail. * * * The effect of the evidence bearing upon the history of agency in torts is thus stated by him (4 Harvard Law Review, page 364):

"The evidence satisfies me that the common law has started from the *patria potestas* and the *frithborh*—whether followed or simply helped by the Roman law, it does not matter,—and that it has worked itself out to its limits through the formula of identity. It is true that liability for another as master or principal is not confined to family relations; but * * * the whole doctrine has been worked

out in terms of master and servant and on the analogies which those terms suggested."

Survival of ancient doctrines which have lost their substance and fiction generalized therefrom are the historical reasons which, according to Holmes, account for these several anomalies in the law of agency, including the one engaging our attention in this brief. But he takes pains to point out that though logic has been striving to "work fiction out to consistent results," "good sense" has restrained it and overcome it when the results became too manifestly unjust, and the whole outline of the law is the resultant of a conflict at every point between the two. The particulars in which he claims that logic has not been able to work the fiction out to consistent results, but has been restrained and overcome by good sense in the department of tort alone, are several. They are as follows: "Than an employer is not liable for the torts of an independent contractor;" "that if the servant commits a willful trespass or any other wrong, when employed about his own business, the master should not be liable;" that the defrauded party to a contract procured by the agent of another may *not* hold the principal "answerable in *solidum* for the damage caused by the fraudulent acts of his servant in the course of the latter's employment," and particularly that "in order to make the latter's act fraudulent," "the knowledge of the principal" may not be united "with the statement of the agent;" that trespass can not be maintained against a master whose servant has committed a trespass for which he is liable when the master has not commanded it; and, finally, that exemplary damages can not be recovered from a master when his servant's conduct has been such as to bring the doctrine of exemplary damages into play.

This latter revolt of good sense from the result which logic left to itself would have worked out from the fiction

of identification has been approved by this Court in the recent case of

Lake Shore, etc., Ry. Co. v. *Prentice*, 147 U. S., 101.

Mr. Justice Holmes, however, is not the only person who has treated the subject of the liability of master for servant's tort historically. Prof. John H. Wigmore, of Northwestern University Law School, Chicago, has done likewise, and the result of his labors may be found in three articles under the title of "Responsibility for Tortious Acts: Its History," in 7 Harvard Law Review, pp. 315, 383, 441. He takes issue with his learned predecessor in the way of considering the matter upon the question as to the fairness and justice of the rule as to the master's liability. He, however, makes no attempt "to phrase the feeling of justice which every man has in the more or less limited responsibility for agent's torts." Indeed, he says that is a matter which "no one has yet succeeded in doing." He concedes the existence in the law on the subject of the fiction of identification of agent or servant with principal or master, but denying the injustice and unfairness of the rule, he disputes further the alleged conflict between logic in attempting to carry the fiction to its consistent results and good sense in restraining this effort and the leading part claimed to have been played by the fiction in working out the law as we now have it. On the contrary, he maintains that it has "played historically" only a "small part."

He denies, further, that the fiction is to be accounted for by a generalization from played out doctrines handed down from early times and helped along by their offspring, and accounts for its existence in this way. It was a "troublesome task" to accurately express a reason for the existence of the rule as to the master's liability of whose policy the judicial mind was quite content. There were

"inherent difficulties" in the effort "to put the rule on a rational footing." This task and effort the judicial mind gave up, and "took refuge, when it came to naming a reason, in a fiction or other form of words." He thus alludes to the form in which the fiction is often put:

"'The master undertakes for the servant's care,' said Lord Holt in *Boson* v. *Landford*, which, of course, is not true. The favorite expressions of this sort, however, were 'the act of the servant is the act of the master' when done in execution of an authority (*Middleton* v. *Farlan; Jones* v. *Hart*), and '*qui facit per alium, facit per se*' (Blackstone; *Laugher* v. *Pointer*), and perhaps 'respondeat superior' has often been used thus to evade giving a clear reason."

His conclusion as to the origin and employment of the fiction is summed up in these words:

"Now here it must be noticed that there are different ways of employing a fiction. One is to accept as a guide a traditional element which no longer answers to the notions of the day and to insist upon its use; as when the loss and finding are alleged in trover, or the loss of service in seduction. In the former case the allegation is now recognized as a pure and ineffectual fiction. In the latter, except by a few statutes, the loss of service must still be proved, though the whole basis of the claim rests today on other notions. A very different way is to employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally. Of this sort is the instance in hand. Sometimes, as where in a document under seal the seal is said to presume a consideration, we borrow some kindred doctrine and force it to our present use; but sometimes, as here, we put forth a phrase not already used for the purpose, but now found very handy. So that what we have to remember about the employment of the above fiction of identification, in the history of the present doctrine, is, (1) that it was merely a reason, an easy, lazy reason, which was put forth to sanction and support a rule of whose practical expediency the Courts were perfectly satisfied; (2) that it was merely one of several reasons, and by no means the most common, and that, in short, the rule would have stood substantially as it does

now, if all reference to the identification fiction were wanting."

But whilst he maintains that the rule in question is justifiable on grounds of fairness and justice he concedes that history has had a good deal to do with the development of the rule as we now have it and the burden of his articles is to point out from the evidence just what that part is. His conclusion is that, what he terms the "command or authority principle" is the true support historically of the responsibility for agent's torts.

He traces the matter in this way. The primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants. In later Germanic times the master could exonerate himself by surrendering the offending person, and at the same time taking an exculpatory oath to the effect that he had no knowledge of it and his conscience was free of guilt. On English soil in the early Anglo-Norman period this idea of responsibility appeared in penal matters in the shape of "exoneration for the deeds of the servant not commanded or consented to," it having, at that time, "hardly begun to be applied to responsibility in what we now term its civil aspect." During the period from Edward First's time, 1300 *circa*, to Lord Holt's time, 1700 *circa*, liability was extended to civil responsibility and the test of liability being "command (*i. e.* before the deed) or consent (assent) (*i. e.* before or after the deed)." This test he says was "the natural and universal one." During the period from Lord Holt's time, 1700 *circa*, to Lord Kenyon's time, 1800 *circa*, somewhat by way of reaction against the refinement which may be termed the doctrine of Particular Command, *i. e.*, the doctrine that the master to be liable must have commanded the very act in which the wrong consisted, which appeared in some cases in the sixteenth and seventeenth centuries the test was changed to that of Implied Command from General Au-

thority. It was the old test in a broader scope. As thus widened the test of liability was "a Command to be implied or posited from a general commission to do a class of acts." The extension was really from liability for acts commanded or consented to to acts committed within the scope of the employment on grounds of policy, the way of expressing the test being a pure fiction when applied to cases of liability for acts of negligence of which the master was in no sense the cause. He says:

"As the full meaning of the situation was realized it was inevitable that the broader terms 'scope of authority,' 'exercise of trade,' 'course of employment,' should prevail; but this was not yet to be."

Since Lord Kenyon's time the real test has been recognized to be that the acts were committed within the scope of the employment. In expressing it the Command test disappeared as a regular one and the broader terms 'scope of employment' and its congeners came into full control.

It was after this extension of liability from acts commanded or consented to to acts done within the scope of the employment and expressed as acts done by the implied command of the master that the fiction of identification came into use as a lazy reason for the existence of the rule as thus extended.

Such then is the account that Prof. Wigmore gives of the development and present existence of the rule as to the liability of the master for the servant's tort and of this fiction of identification as to the existence of which both he and Mr. Chief Justice Holmes agree.

Now it may be asked why this extended consideration of the question as to the reason for the existence of the rule as to liability of master for torts committed under circumstances similar to those under which that complained of in this action was committed. What bearing has it on the matter in hand?

It is thereby shown that it is claimed by no one that the ground of liability on the part of the master is due to the fact that he is responsible in a physical or moral way for the doing of the act that has resulted in harm. It is conceded on all hands that in such cases as the one in hand the master is not the "juridical cause" of the act from which the harm results or of the harmful result. There is no "causal connection" between him and the harmful result. If he is liable because it is fair and just that he should be, the fairness and justice of the liability is due to some one or more of the considerations indicated above none of which involve culpability on the part of the master. If he is liable because of the survivorship and extension of the old liability of the master for the acts of the slave growing out of the privilege of payment as the alternative of a failure to surrender the slave in satisfaction of the passion of revenge helped along by the fiction of indentity as Mr. Chief Justice Holmes claims there is nothing in this view of the matter that connects the master with the harm complained of as a cause thereof. It is true that, according to both Mr. Chief Justice Holmes and Prof. Wigmore, there is in use in connection with the law on this subject a fiction of identity by which the servant and master are feigned to be one person and the master that one—Mr. Chief Justice Holmes viewing it as a generalization from played out doctrines of early times and a force in itself, and Prof. Wigmore viewing it simply as a lazy reason given for what is conceived to be a just rule—which fiction makes the wrongful act of the servant the act of the master, and in this way connects the master with that act as a cause thereof. But it must be borne in mind that this is only a fiction—not a reality. If then Mr. Chief Justice Holmes is correct in his view that good or common sense is against the rule of liability of master for the torts of servant not authorized or consented to by him, the rule being

due to survival and fiction, and that the whole law on the subject of agency grows out of the struggle between survival and fiction on the one hand and common sense on the other hand, this is one instance in which common sense should overcome fiction. The fiction should not be made use of to deprive one of his right to have his cause removed from the state to the Federal court if it is otherwise removable. Reality alone should have that effect. If on the other hand, good or common sense supports the rule as to the master's liability and it exists, however it may have originated, because of this it should have no other incidents attached to it than required by good or common sense. Fiction should be relegated to the place where Prof. Wigmore consigns it—that is to a lazy reason for that which is fair and just. But still further if this fiction is to cut any figure in the matter it should be worked out to its consistent results. According to it the servant and master are one, and the master that one. If such is the case no cause of action should exist against the servant at all, because he has no existence—his existence being swallowed up in that of the master. Such, indeed, was the law in early times. Mr. Chief Justice Holmes in 4 Harvard Law Review, page 363, thus points this out:

"There is another line of cases which afford striking and independent evidence that the law of master and servant is a survival from slavery or other institution of like effect for the present purpose, and that the identification of the two parties was carried out in some cases to its logical result. If a servant, although a freeman, was treated for the purposes of the relation as if he were a slave who only sustained the *persona* of his master, it followed that when the master was liable, the servant was not. There seems to have been a willingness at one time to accept the conclusion. It was said under James and Charles I. that the Sheriff only was liable if an under-Sheriff made a false return, 'for the law doth not take notice of him.' So it was held in the latter reign that case does *not* lie against hus-

band and wife for negligently keeping their fire in their house, 'because this action lies on the . . . . custom . . . . agains *patrem familias* and not against a servant or a *feme* covert who is in the nature of a servant. So Rolle says that 'if the servant of an innkeeper sells wine which is corrupt, knowing this, action of deceit lies not against the servant, for he did this only as a servant.' So as to an attorney maliciously acting in a case where he knew there was no cause of action. 'For that what he does is only as servant to another and in the way of his calling and profession.'

" Later this was cut down by Lord Holt to this rule that a servant is not liable for a neglect (*i. e.*, a non-feasance), 'for they must consider him only as a servant'; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, 'but as a wrong-doer.' That is to say, although it is contrary to theory to allow a servant to be sued for conduct in his capacity as such, he can not rid himself of his responsibility as a freeman, and may be sued as a free wrongdoer. This, of course, is the law today. Yet as late as Blackstone's Commentaries it was said that 'if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant.' "

If, then, this fiction should be worked out to this logical result, there would be but one controversy in this suit, and that one would be between the plaintiff and the corporate defendant, and the cause would be removable under the second clause of the second section of the removal act. And it is a poor rule that does not work both ways. If this fiction is made use of to connect the master with the servant's act when he has no real connection therewith, it certainly ought to be made use of also to disconnect the servant therefrom, when such is the logical result thereof.

The conclusion we reach, therefore, is that the master is not the cause of the servant's act in such a case as this. There is no causal connection between him and that act. He is not an actor in the matter at all. And not being an actor at all he is in no sense a co-actor with the servant in bringing about that act or its harmful result. There is no

union or junction between him or the servant in the matter of the act or its harmful result. The act and its harmful result proceeds solely from the servant.

As Judge Taft said in the Warax case:

"Hence the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business."

And again, on page 643:

"It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on grounds of public policy, which requires that he shall be held responsible for the acts of those he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant and does not exist at all unless it would also exist for the same act when committed, not as the servant, but as the principal. Liabilities created on two such wholly different grounds can not and ought not to be joint."

That there is not one cause of action against the master and servants jointly, but two causes of action against them separately is shown by other considerations. In the first place both are not liable in all cases. Where the servant whose negligent act causes the injury is a fellow-servant of the party injured the master is not liable at all on account of the servant's negligence. Something more must exist in

order for the master to be liable. He himself must have been negligent in the selection of an incompetent servant or in the performance of some other duty due from the master to the servant, or there must be a statute making the master liable. If the master is liable because of some negligence on his part, then the master and servant are liable under different conditions. If the master is liable by virtue of some statute, then one is liable on account of the common or unwritten law and the other on account of statute or the written law.

In the case of

Beuttel v. *Chicago, etc., Ry. Co.*, 26 Fed., 50,

Shiras, J., said:

"As against the defendant, Ensley, the facts alleged are that he was in control of the train as engineer, and that he negligently ran the same over the deceased; the legal cause of action thus charged being the violation of the duty of Ensley to use ordinary care in the running of the train, the same being under his personal control.

"As against the railway company, the facts alleged are that the deceased was in the employ of the company as a night watchman; that the defendant, Ensley, was in the employ of the company as engineer, having charge of a certain train upon defendant's road, which train was negligently run over the deceased, while the latter was in the performance of his duty as an employe of the company. The cause of action thus charged against the company may be based upon either one of two grounds: (1) A violation of the common law duty of the master to use due care in the selection of competent servants, and in furnishing them with all the proper and suitable means and machinery for the safe performance of the duties intrusted to them, the performance of which duty will relieve the master from liability to an employe who receives an injury by reason of the carelessness of a co-employe engaged in the same service; or (2) a liability under the statute of Iowa which enacts that railway companies shall be liable to such of their employes as are engaged in the operating of the railroad for the injuries caused by the negligence of a co-employe.

If the action against the company is based upon the first ground, it is apparent that the fact that the engineer was guilty of negligence in the running of the train which would constitute a cause of action against him, would not alone show a violation of duty on part of the company. If based upon the liability created by the statute, it is equally clear that the ground of action is distinct and separate from that charged against the engineer."

Again, conceding the rule to be that, for a mere non-feasance the servant of the master can not be made responsible to third persons injured thereby, there may be cases where the master alone is liable. Still further, the measure of liability is different. In the case of the servant it may be for punitive as well as compensatory damages, as where he is guilty of a willful act or wanton act of negligence causing injury to another. In the case of the master the extent of the liability is for compensatory damages alone. This has been so held by this Court in the recent case of

Lake Shore, etc., Ry. Co. v. *Prentice*, 147 U. S., 101.

Mr. Justice Gray, in delivering the opinion of the Court, said:

"Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, can not be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent."

In the opinion he quoted the following language from the opinion by Mr. Justice Story in the case of

The Amiable Nancy, 3 Wheat., 546.

"And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them,

in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon which the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."

This is one of the instances where, according to Mr. Chief Justice Holmes, as we have above indicated, common sense has got the upper hand of the fiction that the master and servant are one.

The fact that in Kentucky, where the cause of action arose, punitive damages may be recovered against the master as well as the servant, does not affect the value of this consideration as showing that the cause of action against the master is separate from that against the servant.

Indeed the basis of the contention that the cause of action against the master is separate from that against the servant, to-wit, that the negligent act of the servant is not the act of the master, is recognized in the following *obiter dictum* from the Court of Appeals of Kentucky in the case of

Perkins v. *Stein & Co.*, 94 Ky., 433.

"It is contended by the appellees that the negligent act of the servant or driver in running over the plaintiff was a trespass, and, therefore, an assault and battery in the meaning of the statute, and that for the injury growing directly out of this act an action of trespass would lie at the common law, even against the master. Such an action, they contend, under the authority of *Anderson* v. *Arnold's Ex'cr*, 79 Ky., 370, dies with the person. We do not think, however, that the action is one of trespass. While the injury

was the immediate consequence of the act, and in this particular the requirements of the rule in actions of this class is met, yet it was not the act of the master; the latter may be responsible in damages, indeed ordinarily is, for the negligence of his servant, but case and not trespass is the proper remedy."

That under the old forms of action the master was liable in case and not trespass for the servant's act not commanded by the master as indicated in this *obiter dictum* is an additional consideration in support of the position that the act of the servant is not the act of the master, and that, therefore, the master can not be regarded as a co-actor with the servant and jointly liable with him. Some American cases, it is true, have held that the master is liable in trespass in such a case, *e. g*:

May v. *Bliss*, 22 Vt., 477.
Andrew v. *Howard*, 36 Vt., 248.

But the current of authority is the other way. The leading case is that of

Sharrod v. *London, N. W. Ry. Co.*, 4 Exch., 580.

In that case Baron Parke says:

"The maxim '*qui facit per alium facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant."

Concerning this statement Mr. Chief Justice Holmes, in 4 Harv. Law Rev., page 20, says:

"Considered as reasoning, it would be hard to unite more errors in as many words. '*Qui facit per alium facit per se*' as an axiom admitted by common sense goes no farther than to make a man liable for commanded trespasses, and for them trespass lies. If it be extended beyond that point it simply embodies the fiction, and the precise point of the

fiction is that the direct act of one is treated as if it were the direct act of another. To avoid this conclusion a false reason is given for the liability in general. It is, as has been shown, the old fallacy of the Roman jurists, and is disposed of by the decisions that no amount of care in the choice of one's servants will help the master in a suit against him. But although the reasoning is bad, the language expresses the natural unwillingness of sensible men to sanction an allegation that the defendant directly brought force to bear on the plaintiff, as the proper and formal allegation, when as a matter of fact it was another person who did it by his independent act, and the defendant is only answerable because of a previous contract between himself and the actual wrongdoer."

It is another of the instances where common sense has gotten the better of logic, in the view of the learned writer, as already indicated.

The conclusion to be drawn from all this is that there is no joint cause of action in favor of plaintiff against the corporate and individual defendants. She has two separate causes of action; one against the individual defendants on the ground that they did the act which caused the harm, and one against the corporate defendant because on grounds of public policy, or as "an exigency of the social," according to the Frenchman quoted by Mr. Pollock in his work on Torts, or on the ground of survival and fiction it is liable for the consequences of the individual defendants' act.

Upon principle, therefore, we contend that the controversy between the plaintiff and the corporate defendant was a separable controversy and the cause was removable at its instance.

How is it then upon authority? It has been held in the following cases that the servant and master can not be sued jointly for a harm done by the act of the servant with which the master has no causal connection, to-wit:

Parson v. *Winchell*, 5 Cush., 592.
Mulchey v. *Religious Soc.*, 125 Mass., 487.

Clark v. *Fry*, 8 Ch. St., 358, 377.
Seelen v. *Ryan*, 2 Cin. R., 158.
Campbell v. *Sugar Co.*, 62 Me., 553.
Page v. *Parker*, 40 N. H., 47, 68.
Bailey v. *Bussing*, 37 Conn., 349, 351.

These cases all recognize that the master and servant are not jointly liable because there is no joint cause of action against them for the reasons given above. In the case of

Mulchey v. *Religious Society, supra*,

Mr. Chief Justice Gray said:

"If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a wilful injury done by an agent by the command or authority of his principal, in which both are, in law, principal trespassers, and therefore liable jointly."

In the case of

Campbell v. *Sugar Company, supra*,

the Court said:

"It is the actual, personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and when their acts or neglect result in injury to third parties, they are equally responsible with their principals. But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons, assigned in *Parsons* v. *Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury."

In the case of

Page v. *Parker, supra,*

the Court said:

"In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intendment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it."

It is true that the authorities are not all to this effect. The following may be cited to the contrary, to-wit:

Wright v. *Wilcox*, 19 Wend., 343.
Suydam v. *Moore*, 8 Barb., 358.
Montfort v. *Hughes*, 3 E. D. Smith, 591.
Phelps v. *Wait*, 30 N. Y., 78.
Wright v. *Compton*, 53 Ind., 337.
Newman v. *Fowler*, 37 N. J. Law, 89.
Greenberg v. *Whitcomb Lumber Co.*, 90 Wis., 225.

It will be found upon inspection that the case of *Wright* v. *Wilcox* is first in point of time of all these cases, and that all after that case are founded upon an erroneous *obiter dictum* in it and in seeming ignorance of the decisions we have cited in support of the contention that the master and servant can not be sued jointly. That *dictum* is as follows:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time and under the same circumstances."

And again:

"Why is the master chargeable for the act of his servant? Because what a man does by another he does by himself."

But, as said by Mr. Pollock in his Essays, this is "a plain begging of the question."

In several of the cases following and based upon this *obiter dictum* in *Wright* v. *Wilcox*, the question as to a joint cause of action against the master and servant is not a matter in issue, and the expression thereon is itself an *obiter dictum*. These authorities, therefore, possess but little weight as against those in support of our contention that the master and servant are not jointly liable.

It may be thought that the position taken by these latter authorities is due to the "distinction taken under the old system of special pleading between trespass and trespass on the case." This Court would seem to intimate as much in the case of

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S., 92.

But as said by Judge Taft in the Warax case, that position "goes deeper than mere form and is a distinction between those acts in which the master is really a co-actor with the servant, and those in which his responsibility is based merely on the rule of law that makes him liable for the negligence of his servant in and about his business." It was due to this distinction, justified by common sense, that under that old system the master was not liable at all in trespass for an act of the servant not commanded by him, but only in case, and, hence, that the two could not be sued jointly and, because of it, it was still held in Massachusetts, New Hampshire, Maine and Ohio, in decisions above cited, that the two could not be sued jointly, notwithstanding the fact that "under the procedure in nearly all of them case and trespass could be united in one action and the distinction between them as forms of action had been abolished."

But authorities may be cited directly in point. They are the cases holding that in such a case as this there is a separate controversy between the party injured and the master and that the cause is removable if the other requirements

of the statute are complied with. The cases so holding are the following, to-wit:

Beuttel v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed., 50.
Ferguson v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed., 177.
Warax v. *Cin., N. O. & T. P. Ry. Co.*, 72 Fed., 637.
Hukill v. *Maysville & Big Sandy R. Co.*, 72 Fed., 745.
Hartshorn v. *Atchison, T. & S. F. R. Co.*, 77 Fed., 9.

The case of

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S., 92,

is not opposed to the doctrine of these cases. It is true that Mr. Justice Gray refers to this doctrine in that case, and does not express any approval of it. But neither does he dissent from it. He expressly waives a decision as to its correctness as not involved in that case. It had been twice in the Federal court. On the first occasion it was remanded. On the last it was not remanded, and the question involved in this Court when the above decision was rendered was the propriety of the action of the Circuit Court in refusing to remand the cause to the state Court on this latter occasion. It was held that that action was proper. The propriety of the action of that Court in remanding the cause on the first occasion was not involved in this Court. Attention was called to the fact that the view of the Circuit Court upon which this remand had been based was in conflict with the views subsequently expressed in the Warax and Hukill cases, *supra*, but after doing so, Mr. Justice Gray said:

"But it is unnecessary now to consider which of the views of the Circuit Court upon this question is the correct one, because that Court, by its order remanding this case, distinctly and finally adjudged as between these parties and for the purposes of this case, that, at the time of the filing of the first petition for removal, the case was not removable."

The case of

Brown v. *Coxe Bros. & Co.*, 75 Fed., 689,

is not opposed to our contention. That was a clear case of where the harmful result complained of was alleged to have been occasioned by the concurrent negligence of the master and the servant.

The case of

Deere, Wells & Co. v. *Chicago, M. & St. P. Ry. Co.*, 85 Fed., 876,

is likewise not opposed to the position for which we are contending. That was a case where a fire was set out on the right of way of the railway company by its section foreman and it was negligently permitted to escape from the right of way and destroy the plaintiff's property. The railway company and the section foreman were sued jointly. The petition alleged that:

"The said defendants wrongfully, negligently and carelessly failed and neglected to provide any suitable watching and care of said fire to prevent its spreading to adjoining premises, and did carelessly and negligently suffer and permit said fire so set out and caused by the defendants to spread and be carried to the adjoining premises."

It was held that, according to the averments of the petition, there was but a single cause of action stated against the two defendants for which they were jointly liable.

Shiras, J., said:

"The legal duty counted on, and the failure to meet it, which constitute the legal foundation of the action, is the common law duty resting upon all parties—that everyone in the management of his own affairs, whether by himself or his servant, must so conduct them as not to negligently cause injury to others. A person whose property is destroyed by the negligent setting out of a fire, or by the failure to exercise due care to prevent the spread of the fire when set out, has a right of action against the party or par-

ties guilty of the negligence. If, under the facts of the case and the rules of the common law, more than one party is chargeable with the negligence inhering in the act of setting out the fire, or in not carefully watching and guarding it after it is set out, may they not be jointly sued for the damages caused by the negligence to which each is a party? . . . . There are cases wherein the liability of the master grows out of the relation of master and servant, or, in other words, the liability is not based upon any personal failure to perform a legal duty on the part of the master, but the negligent act of the servant is chargeable to the master because it is connected with the business of the master and is within the general scope of the servant's employment. But there are also cases wherein the law imposes certain duties and obligations which are obligatory on all . . . . which do not grow out of the relation of master and servant or principal and agent, but where the performance of the duty or obligation rests primarily upon all wherein failure in performance is legally chargeable to all upon whom the duty is imposed . . . . The case made in the plaintiff's petition is not founded upon the legal duties and responsibilities growing out of the relation of master and servant, as existing between the defendants, but is directly based upon the duty primarily resting upon all parties to use due care when they set out, or cause to be set out, in the conduct of their business, a dangerous agency like fire. In this case each of the defendants is charged with violation of the same rule of law. It is assumed that each of the defendants was chargeable with the duty of carefully watching and guarding the one fire set out for the one purpose, and it is charged that each failed in the proper performance of this duty."

The previous decisions of this same learned Judge in the Beuttel and Ferguson cases and of Judge Taft in the Warax and Hukill cases are referred to, distinguished and approved of. He concludes:

"The case, therefore, does not fall within the class of cases represented by *Beuttel* v. *Railway Co.*, *Ferguson* v. *Railway Co.*, and *Warax* v. *Railway Co.*, hereinbefore cited, but does fall within the class represented by *Plymouth Con. Gold Min. Co.* v. *Amador & S. Canal Co.*, *supra.*"

The cases of

Craft v. *Eq. Life Assur. Soc.*, 88 Fed., 1;
Doremus v. *Root*, 94 Fed., 760,

decided by Hanford, District Judge, are contrary to our contention. But these two cases proceed upon a bold misconstruction of the decision of this Court in the Powers case in 169 U. S. They assume that this Court, in that case, decided the question up for decision in this case and that adversely to our contention. It was in obedience to this decision as thus construed that those decisions were rendered as they were. The learned Judge who rendered them conceded that our position is correct upon principle. In the Craft case, he said:

"This Court has heretofore ruled . . . . adopting the rule which I now consider to be sound, and well supported by authorities, that when a master is made liable for a negligent or wrongful act of his servant, solely upon the ground of relationship between them, and the application of the rule of *respondeat superior*, and not by reason of any personal participation in the negligent or wrongful act, he is liable severally and not jointly with the servant. I have considered it a logical sequence from this rule that, although the master and his delinquent servant be named as co-defendants in such an action, the complaint shows affirmatively that there is no joint liability and that either defendant may properly claim that there is a separable controversy between himself and the plaintiff."

And in the Doremus case he says:

"The attempt of the Oregon Railroad & Navigation Company to remove this case from the state Court in which it was commenced into this Court is based upon the assumed ground that there is a separable controversy; and it is argued that because the complaint shows affirmatively that the defendants can not be jointly liable to the plaintiff, and as each defendant may pursue an entirely separate and independent course in defense of the action, there is necessarily a separable controversy, and said defendant, being a citizen of another state and non-resident of the state, may

claim the right of removal. This sounds plausible, but I think that the decision of the Supreme Court in the case of *Powers* v. *Railway Co.*, 169 U. S., 92, . . . lays down a rule which constrains me to hold otherwise."

We have thus directed the Court's attention to all that we have been able to find which will throw light upon the interesting question that is up for discussion in this case, and respectfully submit that upon principle and authority the controversy between the plaintiff and the corporate defendant was a separable one, and that by reason thereof it was entitled to have the cause removed from the state to the Federal Court.

We might trespass further upon the Court's time and patience by contending that plaintiff in error was entitled to a removal upon the sole ground that the petition for removal alleged that the individual defendants were neither necessary nor proper parties to the action, and were made defendants for the purpose of depriving the corporate defendant, plaintiff in error, of its right of removal. So far as the state Court was concerned this allegation was bound to be taken as true, and if desired to be combatted could only have been met in the Federal Court.

We content ourselves with submitting this point without further argument.

For these reasons we respectfully submit that the judgment of the Kentucky Court of Appeals should be reversed.

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